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No. 96

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

A. T. GORDON, ET AL.,
Petitioners,

vs.

GRANVILLE H. LANCE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

BRIEF FOR RESPONDENTS

OPINION BELOW

The opinion of the Supreme Court of Appeals of the State of West Virginia (A. 22a) is styled *Lance v. Board of Education* and is reported at 170 S.E.2d 783.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions to the decision of this case are the United States Constitution, Amendment XIV; West Virginia Constitution, Article X, Sections 1, 10 (which are set forth in respondents' Appendix, *infra* at 22) and 8 (which is set forth at A. 71a); West Virginia Code, ch. 11, art. 8, §16

(Michie 1966) and West Virginia Code, ch. 13, art. 1, §§4, 14 (Michie 1966) (the pertinent texts of which are set forth at A. 72-74).

QUESTION PRESENTED

Whether the 60% affirmative vote required by the Constitution and statutes of West Virginia for passage of local referendum questions of incurring bonded indebtedness or increasing tax levies for school improvements debases and dilutes all affirmative votes contrary to the equal protection guaranteed all voters by the Fourteenth Amendment?

STATEMENT OF THE CASE

Petitioners state that this case was presented for decision in both the Circuit Court and the Supreme Court of Appeals of West Virginia "on the pure question of law" of the validity of the sixty percent requirements for bond issues and excess levy elections under the pertinent provisions of the West Virginia Constitution and Code (Petitioners' Brief 5). This is not correct. Although there are no factual issues (defendants below admitted the factual allegations of the complaints) the facts pleaded are necessary and relevant to a decision in this case and were relied upon by the Supreme Court of Appeals in its opinion (A. 30a). They depict the frustrating experiences of the respondents and a majority of the voters of Roane County in their efforts to improve their schools and the education of their children.

Over the last twenty years the county educational system in Roane County has deteriorated until, in the school year 1967-1968, it ranked among the lowest in the state in the caliber of its professional staff and the level

of educational attainment of its children. Although not one of the more favored of the state's fifty-five counties, Roane County is near the average in income and resources available to support the educational efforts within the county. The failure of the county's educational efforts was due directly to its failure to furnish necessary revenues from within the county to support such efforts. Revenues available to the county from state and federal sources were well above the state average, but its current expenditures of $376.00 per pupil during the school year 1967-1968 ranked 49th among the State's 55 counties and was $243.00 behind the national average of $619.00 per pupil (Complaint in Civil Action No. 1063).

There have been no new schools or major additions or improvements to existing schools in Roane County since 1946. Since that time only minor improvements have been made to existing facilities, and the schools in the county have become old and inadequate. Many of the classrooms and other facilities are makeshift and all classrooms are overcrowded. Dangerous conditions exist in many of the structures; and at least two major schools within the county have serious fire hazards which have resulted in the State Fire Marshal and State Superintendent of Schools closing and prohibiting further use of the facilities until the conditions are eliminated. The estimated cost in 1968 to comply with the Fire Marshal's orders was $320,000. (Complaint in Civil Action No. 1062 and Exhibit A thereto).

During the years 1964-1968, the Board of Education and Superintendent of Schools of Roane County attempted to provide additional revenue for the county educational system by submitting to the voters of the county six different propositions, four involving the imposition of

additional levies and two requesting authority to issue bonds. (Annex B to Complaints in Civil Action Nos. 1062 and 1063). On each occasion the propositions submitted to the voters received more than a majority of the votes cast, but failed to attain the required sixty percent.

During the same period in 41 of 76 special elections held in West Virginia where excess levy or bond propositions were defeated, more than fifty percent of the votes cast were in the affirmative. Thus, the result in both Roane County and the State has been to thwart the will of the majority and to maintain minority control of the fiscal policies of the counties.

Respondents are citizens, taxpayers and qualified voters of Roane County. They have been active in support of efforts to provide additional local revenues for the county educational system, contributing their votes, effort and resources in the campaign for the passage of each of the additional levy and bond propositions submitted during 1964-1968. Upon the failure of the additional levy and bond propositions submitted to the voters on March 22, 1968, the Board of Education, at the insistence of respondents and other interested citizens and voters of Roane County, called for new elections to be held on April 29, 1968. These new elections are the subject matter of this action. The first election presented the question of the laying of additional levies in excess of the regular authorized levy for a period of five years, a part of the additional levy to be used for current expenses and a part for capital improvements. The second election presented the question of incurring debt and issuing general obligation bonds in the amount of $1,830,000, the proceeds to be used for capital improvements. In the additional levy election 2,866 votes, or

51.51% of the total number of votes cast, were cast for the laying of the additional levies. In the bond election 2,887 votes, or 51.55% of the total number of the votes cast, were cast for the issuance of the bonds. Again, more than a majority but less than sixty percent of the voters favored each of the propositions.

Following the canvass of the votes cast at the April 29, 1968 elections, respondents appeared before the Board on behalf of themselves and other persons voting with the majority on each of the propositions, and demanded that the Board proceed forthwith to authorize the laying of the additional levies and to issue the bonds as approved by a majority of the voters at the elections. Their demand was made on the ground that the sixty percent requirements of the State Constitution and Code are unconstitutional and invalid in that they deny to respondents and other similarly situated the equal protection of the laws accorded them by the Fourteenth Amendment of the Constitution of the United States and the Republican Form of Government guaranteed unto every State in Article IV, Section 4, of the Federal Constitution. The Board responded that it was ready and able to proceed with the issuance of the bonds and laying of the levies except for the sixty percent requirements.

Respondents filed these actions for declaratory judgments to determine the validity of the sixty percent requirements. The defendants below answered respondents' complaints admitting the facts pleaded but denying respondents' conclusions concerning the validity of the sixty percent requirements and the Board's authority to act upon favorable majority votes. The actions were consolidated for hearing and the Circuit Court, by order entered on November 22, 1968, ordered the complaints

dismissed and the actions stricken from the docket. Respondents then appealed the final order of the Circuit Court to the Supreme Court of Appeals of West Virginia.

On July 8, 1969, the Supreme Court of Appeals reversed the judgment of the Circuit Court and remanded the case for further proceedings consistent with the decision of the Court. In its opinion the Court held that the sixty percent vote requirements of the West Virginia Constitution and Code "are in conflict with and violative of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and that, therefore, such provisions are void and unenforceable." (A. 39a). Having so found, the Court deemed it unnecessary "to decide whether the sixty percent vote requirements in question are violative of the Guaranty Clause of Article IV, Section 4 of the Constitution of the United States." (A. 39a).

When the decision of the Supreme Court of Appeals was announced, the defendants below, the Board of Education, its members, and the Superintendent of Schools of Roane County, resolved not to proceed further with the defense of the action. Thereupon the petitioners, as citizens, voters and taxpayers of Roane County, were permitted to intervene as additional parties defendant by the Supreme Court of Appeals and, thereafter, their motion for rehearing on the merits was denied.

SUMMARY OF ARGUMENT

The Equal Protection Clause guarantees equality within the qualified electorate in all voting cases; that each person's vote count as much as any other person's vote in terms of relative voting power. This guarantee extends to local, special-purpose elections involving ques-

tions of policy as well as elections involving competing candidates.

West Virginia requires a 60% affirmative vote for passage of local referendum questions of incurring bonded indebtedness or increased tax levies for school improvements. Such requirements constitute a State grant of 50% greater weight to the vote of each person opposing the raising of revenues for school improvements; two "no" votes have the same influence on the ultimate result as three "yes" votes. Thus, the votes of all persons voting in the affirmative are diluted and debased, contrary to the guarantee of the Equal Protection Clause.

There can be no State interest which will justify the dilution and debasement of a citizen's vote. Certainly the petitioners' loose and vague assertions concerning local fiscal irresponsibility do not necessitate a 60% affirmative vote requirement. The State has drawn the perimeter of fiscal responsibility in terms of the maximum amount of bonded indebtedness which can be incurred and the absolute maximum levy rate to which taxes can be increased and the maximum length of time any increased tax levy can be effective.

ARGUMENT

THE 60% AFFIRMATIVE VOTE REQUIRED BY THE CONSTITUTION AND STATUTES OF WEST VIRGINIA FOR PASSAGE OF LOCAL REFERENDUM QUESTIONS OF INCURRING BONDED INDEBTEDNESS OR INCREASING TAX LEVIES FOR SCHOOL IMPROVEMENTS DEBASES AND DILUTES ALL AFFIRMATIVE VOTES CONTRARY TO THE EQUAL PROTECTION GUARANTEED ALL VOTERS BY THE FOURTEENTH AMENDMENT.

A.

The Equal Protection Clause Protects The Votes Of Any Portion Of A Qualified Local Electorate From Debasement And Dilution.

It is required by the Constitution and statutes of West Virginia that in special elections to authorize political subdivisions to incur bonded indebtedness or increase tax levies for school improvements, 60% of the participating voters must favor such propositions before such indebtedness can be incurred or such tax levies can be increased. The issue presented in this case is whether this 60% affirmative vote requirement debases and dilutes the votes of those voters favoring the proposition.

This case, then, like *Gray* v. *Sanders*, 372 U. S. 368 (1963) does not present any question of voter qualification or exclusion of otherwise qualified voters from the electorate; nor does it present any question of apportionment or representation. It is a pure voting case presenting the question of whether a portion of the voters participating in an election were denied equal protection of the law by the application of the 60% requirements.

The right to vote is one of the most cherished and fundamental rights of citizens of this country. Being fundamental to a free and democratic society, it has always been scrupulously protected by this Court. *Reynolds* v. *Sims*, 377 U.S. 533 (1964). Without the free and unimpaired exercise of the right to vote, other of our basic rights become illusory. *Wesberry* v. *Sanders*, 376 U.S. 1 (1964).

The free and unimpaired exercise of the right to vote encompasses equality of voting effectiveness as well as

access to the box for "the right of suffrage can be denied by debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds* v. *Sims, supra* at 555.

> There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted. . . . It also includes the right to have the vote counted at full value without dilution or discount. . . . That federally protected right suffers substantial dilution in this case (where) the favored group has full voting strength (and) the groups not in favor have their votes discounted. *South v. Peters*, 379 U.S. 276, 279 (1950) (Douglas and Black, JJ., dissenting).

Gray v. *Sanders, supra,* established the standard against which claimed impairment of the right to vote through dilution or debasement would be judged. This standard is equality of voting power among all persons voting at the election.

> Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of "we the people" under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts

> his ballot in favor of one of several competing candidates, underlies many of our decisions.
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> The only weighting of votes sanctioned by the Constitution concerns matters of representation. . . . But once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.
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> The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing —one person, one vote. *Id.* at 379-81.
>
> • • •

Gray involved a single question of the weight to be given each man's vote in an election, and clearly stated that "the present case is only a voting case." The "one person, one vote" principle of *Gray*, however, has been the dominant force behind the decisions of this Court in subsequent cases dealing with congressional districting, *Wesberry;* the apportionment of seats in state legislatures, *Reynolds* and its companion cases; the apportionment of seats in local governing bodies, *Avery v. Midland County*, 390 U.S. 494 (1968); and the composition of bodies formed for special, limited purposes, *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969); *Hadley v. Junior College District*, ... U.S. ....., 25 L. Ed.2d 45 (1970). Although each of these cases involved apportionment of representatives among geographical units, the rationale of the cases is the same as that of *Gray*—that each voter in an election must have an equal influence in determining the outcome of the elec-

tion. The touchstone of "one person, one vote" is equality within the electorate.

The right to vote is no less sacred when it is cast in a referendum involving questions of governmental policy than when it is cast for a competing candidate. This Court has frequently held that "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 665 (1966). See also *Kramer* and *Hadley*.

> When a court is asked to decide whether a state is required by the Constitution to give each qualified voter the same power in an election open to all, there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election. *Hadley*, 25 L. Ed.2d at 50.

In *Phoenix v. Kolodziejski*, ... U.S. ....., 26 L.Ed.2d 523 (1970) and *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969) this Court applied the Equal Protection Clause to local elections involving the sole question of whether to authorize the issuance of general obligation and revenue bonds, respectively. The issue presented in those cases was whether the State had impermissibly excluded non-property owners from the electorate, but, it is the application of the Equal Protection Clause to the election which is significant, and not the purpose of the election. The test is whether the claimed impairment of the right to vote occurred as a part of "the electoral process" *Moore v. Ogilvie*, 394 U.S. 814, (1969); *Harper*.

The Supreme Court of New Mexico in *State ex rel. Witt* v. *State Canvassing Board*, 437 P.2d 143. (1968) reached this very question and made the logical applica-

tion of *Gray* to voting requirements of the state for the ratification and adoption of constitutional amendments by the people.

> We see no rational basis to distinguish between voting on representatives in the legislature, and voting on constitutional amendments. One is no more a necessary ingredient of our democratic process than the other. Nor can it be said that an equal voice in the selection of the legislature is of greater importance to a citizen than equality of weight and expression of views on changes in our basic charter, the Constitution. As a matter of fact, it is amply evident that the constitutional provision here being considered was quite definitely placed in the constitution to preserve certain rights in a minority group. It has now been made clear that when this is done there is no political equality under the Fourteenth Amendment. . . . (Citing *Gray*). *Id.* at 151.

Thus, in referendums involving questions of governmental policy, as in elections between competing candidates, each voter favoring one side of the proposition must stand on the same footing as any other voter favoring the opposite side of the proposition. Each must have the same opportunity to influence the outcome of the election if there is to be equality within the electorate.

B.

The West Virginia 60% Affirmative Vote Requirements Constitute A State Grant Of 50% Greater Voting Effectiveness To Every Person Voting In The Negative And Thereby Debase Or Dilute The Vote Of Each Person Voting In The Affirmative.

Section 1, Article X of the Constitution of West Virginia, known as the "Tax Limitation Amendment," after

dealing with equal taxation and a maximum rate of taxation, then provides that the State legislature may authorize local levying bodies to tax at a rate above the normal maximum if such an increased levy is favored by "at least 60% of the qualified voters"[1] within the taxing unit. This authorization is embodied in West Virginia Code, ch. 11, art. 8, §16 (Michie 1966).

Section 8, Article X of the Constitution of West Virginia provides that school districts and other local levying bodies may incur indebtedness within certain limits provided ". . . all questions connected with the same shall have been first submitted to a vote of the people, and have received three-fifths of all the votes cast for and against the same." The statutory authority for incurring such indebtedness upon a three-fifths favorable vote is found in West Virginia Code, ch. 13, art. 1, §§ 4, 14 (Michie 1966).

Thus, for a county board of education in West Virginia to raise revenues for school improvements above its usual annual income, it must obtain three-fifths or 60% approval of the qualified voters participating in the election to increase the tax levy or incur indebtedness by the issuance of bonds.

Clearly, the end result of the application of the 60% affirmative vote requirements constitutes a grant of 50% greater voting power to persons opposing the raising of additional revenues for school improvements, thereby diluting and debasing the weight of votes of persons favoring school improvements. Since 40% of the electorate can prevail if they happen to oppose the increasing of revenues for school improve-

[1]This language has been construed to mean 60% of the votes actually cast. *Warden v. County Court*, 116 W. Va. 695, 183 S.E. 39 (1935).

ments, each "no" vote counts 150% as much as any "yes" vote in terms of its effect upon the outcome of the election. In practical terms this means that three "yes" votes have the same influence on the ultimate result as only two "no" votes.

It would be a functional equivalent of the above constitutional and statutory provisions if West Virginia had provided instead, that before counting the votes one-third of all affirmative votes would be discarded or that after counting the votes all negative votes would be multiplied by a factor of 1.5. Any such scheme would undoubtedly be held to impermissibly dilute the votes of persons favoring the proposition.

> . . . if a State should provide that the votes of citizens in one part of the State should be given two times, or five times or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. *Reynolds v. Sims, supra* at 562.

The sixty percent affirmative vote requirements, then, present the exact question which was decided in *Gray*—how can one person be given voting power 50% greater than another person in a county-wide referendum merely because he does not believe the proposition being voted upon should pass. The answer to the question is supplied in the plain finding of *Gray*—once the geographical unit in which the proposition is to be applied has been designated and the qualifications of the voters fixed, all who participate in the election must have an equal voice.

The petitioners have argued that respondents' votes were not diluted in the elections in question by the application of the sixty percent affirmative vote re-

quirements, because each voter in the election cast one vote and each vote was counted as one vote. They misconceive or ignore this Court's application of the term "dilution", however. The concept of equality within the electorate, clearly enunciated in *Gray*, relates to the *relative effect of voting power between voters* and requires that each voter have the same influence in determining the outcome of the election. Thus, it is not the quantitative casting of the votes or their counting, but the qualitative application of the sixty percent affirmative vote requirements to the votes as counted which is significant in the consideration of equality within the electorate.

Furthermore, the disparity in the effectiveness of voting power which results from the application of the sixty percent voting requirements is based solely upon the way a citizen votes. Those voting in the affirmative have been effectively "fenced out" from a part of their voting power simply because of the way they *might* vote, the procedure condemned in *Carrington* v. *Rash*, 380 U.S. 89 (1965) in which military personnel stationed in Texas were denied the right to vote, because of the overwhelming weight which their votes might have upon a local election. The requirement of a sixty percent affirmative vote is but a more subtle approach to that which was proscribed in *Carrington*—here a heavier burden is placed on those whose views are apparently disfavored by the State.

Petitioners reliance on *Fortson* v. *Morris*, 385 U.S. 231, (1966) is misplaced. All that was decided in *Fortson* was that a state did not have to submit the selection of public officials to a vote of the people; and that it was constitutionally permissible to provide, in case no candidate received a majority of the votes in a gubernatorial

election, that the legislature should elect the governor. There was no question of vote dilution in the election. This holding is made clear by the subsequent decisions of *Kramer* and *Hadley*, that although there may be no requirement that a question be submitted to the voters, "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper v. Virginia Board of Elections, supra* at 665.

In requiring a 60% affirmative vote in these elections, the State has placed its thumb on the negative side of the election scales; in so doing it has diluted the voting power of all affirmative votes and drawn a line which is inconsistent with the Equal Protection Clause of the Fourteenth Amendment.

C.

There Is No Competing State Interest Which Will Justify, Within The Constitutional Concept Of Equal Protection, The Debasement And Dilution Of Respondents' Votes In The School Bond And Increased Tax Levy Election.

A State has broad powers to determine the conditions under which the right of suffrage may be exercised; such regulations carry a presumption of constitutionality. *Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45 (1959). A State has the power to define the electorate thereby excluding some otherwise qualified voters; but the State may properly exercise this power only when the definition and resulting exclusion are necessary to promote a compelling state interest. *Phoenix; Cipriano; Kramer.* "But . . . the interest of the State, when it comes to voting is limited to the power to fix qualifications." *Harper v. Virginia Board of Elections, supra* at

668. Once the electorate is properly defined, the State has no power to impose any burden on the exercise of the franchise which has the effect of diluting the voting power of some of the electorate.

> Presumptively, when all citizens are affected in important ways by a governmental decision subject to a referendum, the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise. *Phoenix v. Kolodziejski*, 26 L.Ed.2d at 527.

Gray clearly established the principle that equal protection means equality of voting power within the electorate. It was "only a voting case" and made clear that once the geographical unit for the election is designated and the qualifications of the voters fixed "all who participate in the election are to have an equal vote." *Wesberry, Reynolds*, and the subsequent apportionment cases applied this principle with increasing vigilance. Any state election scheme, where the ratio of voting effectiveness between any two voters deviates more than minimally from a standard of equality, impermissibly debases or dilutes the vote. See, *e.g.*, *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969). In none of these cases was a "compelling state interest" permitted to justify any deviation from the standard of equality established in *Gray*. It is only in cases involving the fixing of the qualifications of the voters and the exclusion of some voters from the franchise that a "compelling state interest" or a rational basis for the state plan has been discussed or permitted to justify obvious discrimination under the Equal Protection Clause. See *Harper, Carrington, Cipriano, Phoenix*.

There can be, therefore, no competing state interest which will justify the debasement and dilution of the

votes of a portion of the electorate because of the way they vote. To argue otherwise ignores the plain finding of *Gray*, and leads inevitably to the systematic frustration of the will of the majority of the voters contrary to the "democratic ideals of equality and majority rule, which have served this Nation so well in the past," *Reynolds*, 377 U.S. at 566. The efforts of the citizens of Roane County to improve their schools and the education of their children, and the experience in other counties in West Virginia and throughout the nation in similar referendums for educational and other governmental purposes are indicative of this trend.

Apparently petitioners take the position that the 60% affirmative vote requirements serve the compelling state interests of the prevention of "burdensome indebtedness and excessive taxation", the State's "reputation for fiscal integrity", and "restriction on fiscal irresponsibility". (Petitioners' Brief 11). These statements of state interests are too vague to be compelling, but assuming, *arguendo*, that they are compelling state interests, the 60% affirmative vote requirement is not necessary for their achievement.

For reasons equally applicable here, but which for the sake of brevity will not be repeated, the Supreme Court of California has, upon detailed consideration, held that there could be no necessary connection between California's two-thirds affirmative vote requirement in local bond referendums and the argued state interest of local fiscal responsibility. *Westbrook* v. *Mihaly*, 2 Cal.3d 765, 471 P.2d 487 (1970). Furthermore, if the argument were logically sound, that the 60% affirmative vote requirement is necessary to the accomplishment of local fiscal responsibility, there should be

widespread fiscal instability within the 30 states which have no such special majority requirements in local bond referendums. See the appendix to Note, 56 Va. L. Rev. 295 (1970).

West Virginia's three-fifths affirmative vote requirement relating to the incurring of bonded indebtedness is but one of many checks against local fiscal irresponsibility. Judge Haymond, a member of the 1872 Constitutional Convention which first wrote this provision, said of Section 8, Article X of the West Virginia Constitution in *List* v. *City of Wheeling*, 7 W.Va. 501 (1874):

> The evident object of the section was to prevent a growing evil of the day, viz: The creation of large debts, the unnecessary and wasteful, as well as fraudulent, expenditure of the substance and earnings of the people and unnecessary and oppressive taxation. Whether the section will accomplish the object or not remains to be seen by experience. It is to be hoped it will. *Id.* at 523.

It is to be noted that this section in its inception was not apparently viewed as *necessary* to the accomplishment of the stated objective, rather it was experimentally conceived in the *hope* of accomplishing this end. Judge Haymond said nothing from which the necessity of the three-fifths affirmative vote in accomplishing this end can be inferred. However, he stated:

> The plain and evident meaning, and intent of the people in the adoption of this section of the tenth article of the Constitution was to prescribe a limit beyond which cities, counties &c., should not go in the contraction of debts. *Id.*

The absolute limit on debt (five per centum of the value of the taxable property within the unit) imposed by another provision of this section is the really effective

method by which local fiscal irresponsibility in incurring unwise large debts is accomplished. This end is further advanced by the regulatory provisions contained within Article 1, Chapter 13 of the West Virginia Code dealing with public bond issues.

With regard to the increased tax levy, Section 1, Article X of the West Virginia Constitution provides, in addition to the 60% affirmative vote requirement, an absolute limit upon the amount of any increased taxation and an absolute limit on the length of time the increased tax levy will be effective. By reason of Section 10 of this Article, known as the Better Schools Amendment, these absolute limits are slightly raised when the increased tax levy is only for the support of public schools. The absolute limit upon tax levies for the support of public schools in West Virginia is $1.00 per hundred dollars value on agricultural and intangible personal property, $2.00 per hundred dollars value on owner-occupied real estate, $3.00 per hundred dollars value on all other property outside municipalities, and $4.00 per hundred dollars value on all other property within municipalities. The absolute time limit for such increased levies is five years.

If the State of West Virginia has prescribed absolute maximums as to the amount of debt a local taxing unit can incur and as to the rate of taxation, has it not thereby prescribed the perimeter of fiscal responsibility? If the State has set outside limits of possible indebtedness and rates of taxation, then it implies if the local taxing units stay within these bounds, they should not get into financial difficulties and the people will not be taxed oppressively. What difference does it make whether the maximum limit is reached by 51% vote or by 60% vote?

Respondents are unable, therefore, to conceive of any necessary connection between these 60% affirmative vote provisions and local fiscal responsibility; furthermore, petitioners have ignored their burden and suggested none.

Since there is no demonstrable necessity for a 60% affirmative vote in local referendum elections concerning increased tax levies and incurring bonded indebtedness to accomplish even the arguably compelling state interest of local fiscal responsibility, such being adequately accomplished by absolute constitutional maximum ceilings, and since the 60% affirmative vote provisions do impose inequalities on the electorate and thwart the will of the majority by debasing the votes of those who favor such propositions, the 60% affirmative vote provisions cannot stand contrary to the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

The respondents respectfully urge this Court to affirm the decision of the Supreme Court of Appeals of West Virginia because that Court correctly ascertained and applied the principles of equal protection contained in the Fourteenth Amendment in order to prevent debasement of respondents' votes.

Respectfully submitted this 18th day of September, 1970.

J. HENRY FRANCIS, JR.
CHARLES C. WISE, JR.
JOHN J. NESIUS
Attorneys for Respondents

APPENDIX

West Virginia Constitution, Article X, Section 1 provides:

> 1. Subject to the exceptions in this section contained, taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value; except that the aggregate of taxes assessed in any one year upon personal property employed exclusively in agriculture, including horticulture and grazing, products of agriculture as above defined, including live stock, while owned by the producer, and money, notes, bonds, bills and accounts receiveable, stocks and other similar intangible personal property shall not exceed fifty cents on each one hundred dollars of value thereon and upon all property owned, used and occupied by the owner thereof exclusively for residential purposes and upon farms occupied and cultivated by their owners or bona-fide tenants one dollar; and upon all other property situated outside of municipalities, one dollar and fifty cents; and upon all other such property situated within municipalities, two dollars; and the legislature shall further provide by general law, for increasing the maximum rates, authorized to be fixed, by the different levying bodies upon all classes of property, by submitting the question to the voters of the taxing units affected, but no increase shall be effective unless at least sixty per cent of the qualified voters shall favor such increase, and such increase shall not continue for a longer period than three years at any one time, and shall never exceed by more

than fifty per cent the maximum rate herein provided and prescribed by law; and the revenue derived from this source shall be apportioned by the legislature among the levying units of the State in proportion to the levy laid in said units upon real and other personal property; but property used for educational, literary, scientific, religious or charitable purposes, all cemeteries, public property, the personal property, including live stock, employed exclusively in agriculture as above defined and the products of agriculture as so defined while owned by the producers may by law be exempted from taxation; household goods to the value of two hundred dollars shall be exempted from taxation. The legislature shall have authority to tax privileges, franchises, and incomes of persons and corporations and to classify and graduate the tax on all incomes according to the amount thereof and to exempt from taxation, incomes below a minimum to be fixed from time to time, and such revenues as may be derived from such tax may be appropriated as the legislature may provide. After the year nineteen hundred thirty-three, the rate of the State tax upon property shall not exceed one cent upon the hundred dollars valuation, except to pay the principal and interest of bonded indebtedness of the State now existing.

West Virginia Constitution, Article X, Section 10 provides:

10. Notwithstanding any other provision of the Constitution to the contrary, the maximum rates authorized and allocated by law for tax levies on the several classes of property for the support of public schools may be increased in any school district for a period not to exceed five years, and in an amount not to exceed one hundred per cent of such maximum rates, if such increase is approved, in the manner provided by law, by at

least sixty per cent of the qualified voters of the school district.

Notwithstanding any other provision of the Constitution to the contrary, the maximum rates provided for tax levies by school districts on the several classes of property may be used entirely for current expense purposes; and all levies required for principal and interest payments on any bonded indebtedness, now or hereafter contracted, not to exceed five per centum on the value of the taxable property therein, the value to be ascertained in accordance with section eight of this article, shall be laid separate and apart and in addition to such maximum rates, but in the same proportions as such maximum rates are levied on the several classes of property.